(27)



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

---

# No. 88

---

MRS. LESLIE F. SLADE, ET AL.,
*Petitioners,*

*vs.*

SHELL OIL COMPANY, INC., ET AL.,
*Respondents.*

---

## REPLY BRIEF FOR PETITIONERS.

---

MARCELLUS GREEN,
ROSS R. BARNETT,
P. Z. JONES,
GARNER W. GREEN,
*Counsel for Petitioners.*

FRANK F. MIZE,
*Forest, Mississippi;*
GREEN & GREEN,
*Jackson, Mississippi;*
BARNETT, BARNETT, JONES & STONE,
*Jackson, Mississippi,*
*Of Counsel.*

# INDEX.

## Subject Index.


| | Page |
|---|---|
| Reply brief for petitioners | 1 |
| General remarks | 1 |
| Petitioners' alleged failure to comply with Rule 27, paragraphs 2 (d) and 3, and Rule 38, Paragraph 2 of this Court (Respondents' Brief 1, 2) | 2 |
| Defendants' fog (Respondents' Brief, page 3) | 4 |
| The majority of the Court of Appeals reversed because they assumed to find "It is settled by a long line of Louisiana cases (cited in the margin) that he (Slade) was *guilty of contributory negligence as a matter of law*" and may not recover "for injuries resulting therefrom", (Respondent' Brief, page 10; R. 603; P. C. 59), while in *Gaiennie* v. *Co-operative Produce Co.* (La. Ct.. Appeals, 1st Circuit), 196 La. 417, 199 So. 611, Judge LeBlanc declared as to these same decisions: "We * * * were left with serious doubt, in view of the apparent conflict in some of the decisions of the various Courts of Appeal of this State, on the question of contributory negligence as pleaded." | 5 |
| Opposite counsel claim that Slade "Struck Greer's Overturned Truck With a Terrific Impact Shearing the Steel 'King Pin' Approximately Three Inches in Diameter, Releasing the Trailer to His Truck, Which Plowed Forward Into the Cab * * *" (Brief, Page 9 | 20 |
| Other Inaccuracies | 21 |
| Resume | 21 |
| Appendix 1 | 23 |
| Appendix 2 | 23 |

## Table of Cases Cited.


| | Page |
|---|---|
| *American Airways* v. *Ford Motor Co.* (1939), 10 N. Y. Supp. (2) 816, 170 Misc. 721 | 21 |
| *Blahut* v. *McCahil* (1935) (La. Ct. App., 1st Cir.), 163 So. 195, 198 | 12 |
| *Broussard* v. *Krause* (1st Cir.), 186 So. 384 | 16 |
| *Chesapeake & Ohio Ry. Co.* v. *Waid*, 4 Cir., 25 F. (2d) 366 | 18 |
| *Furness, Withy & Co.* v. *Yang-Tze Ins. Assn.*, 242 U. S. 430, 61 L. Ed. 409 | 3 |
| *Futch Case*, 12 La. App. 535 (La. St. App., 1st Cir.), 126 So. 590 | 10 |
| *Gaiennie* v. *Co-operative Produce Co.* (La. Ct. Appeals, 1st Circuit), 196 La. 417, 199 So. 611 | 5 |
| *General Exch. Ins. Corp.* v. *Romano* (1st Cir., La. Ct. App., 1939), 190 So. 168 | 15 |
| *Goodwin* v. *Theriot* (1st Cir.), 165 So. 342 | 17 |
| *Hanno* v. *Motor Freight Lines, Inc.*, 17 La. App. 62, 134 So. 317 (La. Ct. App., 1st Cir.), certiorari denied July 17, 1931 | 12 |
| *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440, 62 L. Ed. 385 | 3 |
| *I. C. R. R. Co.* v. *Moore*, 312 U. S. 630, 85 L. Ed. 1081 | 6 |
| *Johnson* v. *Atlantic Coast Line Railroad*, 112 S. C. 47, 99 S. E. 755 | 20, 21 |
| *Kirk* v. *United Gas Public Service Co.*, 185 La. 580, 170 So. 1 | 9 |
| *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163, 67 L. Ed. 922 | 3 |
| *Moncrief* v. *Ober*, 3 La. App. 660 | 9 |
| *Nowoty* v. *St. Louis Brewing Assn.* (1914), 185 Mo. App. 709, 171 S. W. 941 | 21 |
| *O'Rourke* v. *McConaughey* (1934) (Ct. App. La., Orleans, 157 So. 598 | 12 |
| *Peart* v. *Orleans-Kenner Traction Co.* (La. Ct. App., Orleans, 1928), 123 So. 822, 823 | 13 |
| *Six Companies, etc.*, v. *Highway District No. 13*, 311 U. S. 180, 85 L. Ed. 114 | 6, 22 |

Page

*Southern Power Co.* v. *North Carolina Pub. Serv. Co.*, 263 U. S. 508, 68 L. Ed. 413 ..... 3
*Stafford* v. *Nelson Bros.*, 15 La. App. 51. 130 So. 234 ..... 11
*United States* v. *Johnson*, 63 Sup. Ct. 1233, 87 L. Ed. (Advance Sheets) 1117 ..... 4
*United States* v. *Rimer*, 220 U. S. 547, 55 L. Ed. 578 .. 2
*West* v. *Amer. T. & T. Co.*, 311 U. S. 223, 85 L. Ed. 139, 144 ..... 6, 22
*Wilkinson* v. *Evans* (1907), 34 Pa. Sup. Ct. 472 ..... 21
*Williams Mfg. Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 86 L. Ed. 1537 ..... 4
*Woodley & Collins* v. *Schusters' Wholesale Produce Co.*, 170 La. 527, 128 So. 469 ..... 8

AUTHORITIES CITED.

37 A. L. R. 590 (note) ..... 19
73 A. L. R. 1925 (note) ..... 19
Cyc. Automobile Law, Huddy, 9th Ed., Vols. 19-20, Sec. 26, page 131 ..... 20
Digest, Title "Appeal", Key No. 1506 ..... 4

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

---

# No. 88

---

MRS. LESLIE F. SLADE, ET AL.,

*vs.* *Petitioners,*

SHELL OIL COMPANY, INC., ET AL.,

*Respondents.*

---

## REPLY BRIEF FOR PETITIONERS.

---

### I.

### General Remarks.

After careful study of the reply of Shell Oil Company, Inc., et al., respondents, with deference, we submit that Certiorari should be granted for the reasons set forth in petitioners' brief, affirming that they vouchsafe to petitioners this writ.

We make response to the extent deemed necessary, to respondents' contentions, listing them in the order of their importance.

II.

**Petitioners' Alleged Failure to Comply With Rule 27, Paragraphs 2 (d) and 3, and Rule 38, Paragraph 2 of This Court (Respondents' Brief 1, 2).**

1. Rule 38, paragraph 2 is that here controlling. Its pertinent provisions are:

> "The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question (See Rule 12, par. 1); the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise. (See Rules 26 and 27.) A failure to comply with these requirements will be a sufficient reason for denying the petition. See United States *v.* Rimer, 220 U. S. 547; Furness, Withy & Co. *v.* Yang Tsze Insurance Assn., 242 U. S. 430; Houston Oil Co. *v.* Goodrich, 245 U. S. 440; Layne & Bowler Corporation *v.* Western Well Works, 261 U. S. 387, 392; Magnum Import Co. *v.* Coty, 262 U. S. 159, 163; Southern Power Co. *v.* North Carolina Public Service Co., 263 U. S. 508."

With deference, this Court, as well as respondents, thoroughly understood the reasons why Certiorari was asked and we, with deference, submit that the petition and brief filed literally comply with this rule.

2. Respondents' cases, taken from Rule 38, paragraph 2, are not here applicable, being readily distinguishable:

(a) *United States* v. *Rimer,* 220 U. S. 547, 55 L. Ed. 578. Therein Certiorari had been granted upon the representa-

tion of the United States that this case involved a principle of far-reaching importance. On the final hearing, it developed that it did not; therefore, the writ was dismissed.

(b) *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U. S. 430, 61 L. Ed. 409.

Therein, Certiorari having been granted, the writ was dismissed, when it appeared on the hearing that a later final decree was based upon an express compromise agreement precluding attack.

(c) *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440, 62 L. Ed. 385.

Therein, the writ was granted, but upon hearing it developed that the questions involved depended essentially upon the solution of a question of fact and therefore the writ was dismissed.

(d) *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163, 67 L. Ed. 922.

This involved not the dismissal of a petition for Certiorari, but under what circumstances this Court would stay the judgment in the Court of Appeals pending an application for Certiorari herein.

(e) *Southern Power Co.* v. *North Carolina Pub. Serv. Co.*, 263 U. S. 508, 68 L. Ed. 413.

In this case the petition for Certiorari alleged that the decree would deprive petitioners of property without due process of law and freedom to contract, contrary to the constitution. The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use, primarily a question of fact. Therefore certiorari was dismissed.

## III.

### Defendants' Fog (Respondents' Brief, Page 3).

As to whether or not Respondents caused the fog wherein Slade was killed, plaintiffs' evidence showed that it did; upon respondents' motion for directed verdict at the conclusion of plaintiffs' testimony (R. 397), the District Judge so ruled; at the conclusion of all of the evidence, the District Judge declared (R. 561), "Let the case now be submitted to the jury."

Whereupon the jury returned a verdict for petitioners, each juror signing the verdict—a rather unusual proceeding—(R. 561); thereafter, the District Judge refused to vacate the finding that defendants' fog caused or contributed to the injury (R. 575) in overruling defendants' motion for judgment notwithstanding the verdict, and, in the alternative, for a new trial (R. 576).

The Court of Appeals said, "There was sufficient evidence to support the verdict of the jury" (133 Fed. 2d 519, R. 600, P. C. 55).

This concurrence of the trial court and the Court of Appeals on this question of fact concludes this Court. *United States* v. *Johnson,* 63 S. Ct. 1233, 87 L. Ed. (Advance Sheets) 1117; *Williams Mfg. Co.* v. *United Shoe Machinery Corp.,* 316 U. S. 364, 86 L. Ed. 1537; Digest, Title "Appeal", Key No. 1506.

According to witness Greer, as quoted in the opinion of the Court of Appeals (R. 601; 133 Fed. 2d 519; P. C. 55):

> "When I was in the thin fog, the thick fog did not look like fog to me. It looked like smoke over the road and you couldn't tell what distance it was. Driving into the fog you would get into it before you could see it. * * *"

So that negligence may not be here controverted.

## IV.

**The majority of the Court of Appeals reversed because they assumed to find "It is settled by a long line of Louisiana cases (cited in the margin) that he (Slade) was *guilty of contributory negligence as a matter of law*"* and may not recover "for injuries resulting therefrom", (Respondents' Brief, page 10; R. 603; P. C. 59), while in Gaiennie v. Co-operative Produce Co., (La. Ct. Appeals, 1st Circuit), 196 La. 417, 199 So. 611, Judge LeBlanc declared as to these same decisions:**

> **"We * * * were left with serious doubt, in view of the apparent conflict in some of the decisions of the various Courts of Appeal of this State, on the question of contributory negligence as pleaded."**

Respondents cite many cases (but none conflicting post-dating the Gaiennie decision), assuming, with deference, wrongfully, to make the question of Slade's conduct a matter, not for the jury, but for the court.

In Louisiana, there is a Supreme Court, consisting of the Chief Justice and six Associate Justices, and there are also three intermediate Courts of Appeal, inferior to the Supreme Court, namely, the Court of Appeals for Orleans; the Court of Appeals, First District, Baton Rouge; and the Court of Appeals, Second District, Shreveport, having three judges each.

As was said by Judge LeBlanc, 196 La. 417, 199 So. 611, in *Gaiennie* v. *Co-operative Produce Co.*

> "After it had been argued and submitted to this court (Louisiana Court of Appeals, 1st Circuit) and we had made a finding of fact on which we readily reached the conclusion that the driver of the truck of the defendant Co-Operative Produce Company, Inc., was guilty of gross negligence, * * * (we) * * * were

* Italics ours, unless otherwise noted.

> left with serious doubt, *in view of the apparent conflict in some of the decisions of the various Courts of Appeal of this State,* on the question of contributory negligence as pleaded against the plaintiff, we took the liberty of certifying the case to the Supreme Court of the State, under the provisions of Article VII, Section 25 of the Constitution. (Appendix 1 hereto.) After due consideration, the Supreme Court answered the questions propounded by us handing down a written opinion which has now become final. 199 So. 377 (196 La. 417),"

wherefrom, it is quite apparent:

(a) That this finding of "apparent conflict" among the decisions of the Courts of Appeal of Louisiana was binding upon the Federal Court of Appeals, even though that Court of Appeals was an intermediate court. *West* v. *Amer. T. & T. Co.*, 311 U. S. 223, 85 L. ed. 139, 144; *Six Companies etc.* v. *Highway District No. 13*, 311 U. S. 180, 85 L. ed. 114. And when, pursuant to such finding, the Supreme Court of Louisiana took jurisdiction to rectify, then its interpretation of that requisite under Louisiana's statute for construction was doubly conclusive. *I. C. R. R. Co.* v. *Moore*, 312 U. S. 630, 85 L. ed. 1081.

(b) That whether there was contributory negligence or not in a case of this kind—fog being dealt with by the Louisiana Court on the same basis as blinding headlights—"It is settled by a long line of Louisiana cases" cited in the margin, that he was guilty of contributory negligence, is not accurate; but, on the contrary, the Court of Appeals was "left in serious doubt, in view of the apparent conflict in some of the decisions of the various Courts of Appeal of this State, on the question of contributory negligence as pleaded against the plaintiff." There was a parked car on the highway. Plaintiff

> "kept his car in the south lane of travel on the paved portion of the highway which was to his right,

and as he neared the point where the truck was parked he began meeting cars going west or in the opposite direction to that in which he was travelling. There were four or five cars following each other and all of them with the headlights burning so brighly as to dazzle his eyesight intermittently. He dimmed the headlights on his car and slowed down its speed to between 20 and 25 miles per hour.

"The effect of the dazzling lights from the cars he was meeting was that he was not blinded by them but his vision was momentarily and intermittently impaired to the extent that instead of having a full view of the paved highway ahead of him as he had without such impairment, his view of the pavement was limited to approximately 18 or 20 ft. within which distance he could, at the speed he was going, bring his car to a stop. As he had dimmed the headlights on his car, that had the effect of tilting the beam of light downward at an acute angle on the pavement in front of him, this also causing some restriction in his sight of the pavement as far as distance is concerned.

"Plaintiff felt safe in proceeding on the highway under the circumstances, and he did. As he passed the last of the series of cars whose dazzling headlights caused momentary impairment to his ordinary vision, his car, in the meantime covering such distance as its speed carried it, he found himself confronted with the truck parked on the highway without any sign or warning of its presence, some eight or ten feet ahead of him. The rear body of the truck was some 3 or 4 feet above the ground and extended back some four feet over the rear wheels, so that when plaintiff dimmed his lights the titlted beam of his headlights projected under the truck making it that much more difficult for him to see it.

"As the truck loomed in front of him he made an effort to avoid running into it by applying his brakes and pulling his car to the left in order to pass around it. He was too close then, however, to avert a collision. The right front end of his car struck the

rear left end of the truck and because the body of the truck stood lower from the level of the pavement than the radiator and hood of the car by some two to four inches, the front end of the car was pushed under the truck and the upper parts of the car which are made of lighter material such as the radiator, the hood and cowl were badly crushed."

And thereupon, in answering this question, the Supreme Court of Louisiana said:

> "For the reasons set out above, our answer to the first question is that we cannot lay down a hard and fast rule to govern in these types of cases because so much depends upon the circumstances of each particular case.
>
> "Our answer to question two is that under the facts outlined the plaintiff was not guilty of contributory negligence."
>
> (199 So., 378, 379, 612, 613).

The *Gaiennie Case* made explicit *Woodley & Collins* v. *Schusters' Wholesale Produce Co.*, 170 La. 527, 128 So. 469, (misunderstood by certain opinions in the State Court of Appeals), which it epitomized, 199 So. 379, 196 La. 417, thus:

> "In discussing whether or not the driver of an automobile should be deemed negligent for failing to slow down, we stated that it depended on the circumstances of the particular case, and that it is not easy, nor safe, to lay down a hard and fast rule on the subject. The difficulty in laying down a hard and fast rule is that the act provides that the conditions and circumstances must be considered as well as the traffic, surface and width of the highway, and the location of the neighborhood. Such being the case, the particular facts of each case must be considered in arriving at a conclusion, and it would not be safe to lay down a hard and fast rule for that reason."

And, further, the Supreme Court of Louisiana said, when referring to the rule made "ironclad" by the Court of Appeals:

> "While the general rule makes it the duty of the driver of an automobile to maintain a speed sufficiently slow and to have such control of his car that he can stop within the distance in which he can plainly see an obstruction or danger ahead, yet it has been well recognized that this rule has exceptions and modifications. Jacobs v. Jacobs, 141 La. 272, 74 So. 992, L. R. A. 1917F, 253."

And the Supreme Court of Louisiana approved *Moncrief* v. *Ober,* 3 La. App. 660, wherein the plaintiff ran over a small cable stretched above the public road, and *Kirk* v. *United Gas Public Service Co.,* 185 La. 580, 170 So. 1, wherein the plaintiff admitted seeing the object in the road, but misjudged its character, and the Court approved a finding awarding damages.

So that, when the Court of Appeals says there is "a long line of Louisiana cases" by which the question of "contributory negligence as a matter of law" "is well settled," with deference, it misread completely the Louisiana decisions, chiefly from the Courts of Appeal in that state where the Court may find expressions, with deference, irreconcilable not only between the three Courts of Appeal but in the same Court of Appeals from time to time. We have in Appendix 2 detailed some of these conflicts, wherefrom this Court may verify that said by the Court of Appeals of Louisiana, First Circuit, in the *Gaiennie Case.*

(c) It is interesting to note respondents say (Page 15):

> "It should be noted that petitioners relied upon Futch *v.* Addison et al., 12 La. App. 535, 126 So. 590; Stafford *v.* Nelson Bros., 15 La. App. 51, 130 So. 234, 235; Hanno *v.* Motor Freight Lines, Inc., 17 La. App. 62, 134 So. 317.

> "Each of the above styled cases have been subsequently expressly disapproved or overruled. O'Rourke *v.* McConaughey, (La. C. App., 1934) 157 So. 598 (605); Blahut *v.* McCahil, 163 So. 195 (198)."

With deference to opposite Counsel the Futch, Stafford and Hanno cases are almost, if not quite, in accord with the Gaiennie case, and are, notwithstanding opposite counsel, appropriate expressions of presently applicable Louisiana law.

(1) In the *Futch Case,* 12 La. App. 535 (La. Ct. App., 1st Cir.), 126 So. 590, Futch sued Addison, and recovered. In the opinion, it is said:

> "The evidence shows that plaintiff was driving southward on the highway; * * * at a moderate speed. The obstruction (two saw logs * * * located on a trailer and parked on the western side of the road without lights to warn of its presence) * * * Just as plaintiff reached the bridge, two automobiles were coming northward with glaring headlights; one of them was so near the bridge when plaintiff entered on it that it was necessary for it to slow down in order that plaintiff might get over the bridge before the one nearest entered on it. As plaintiff passed over the bridge, the other automobile, coming north, was about opposite the truck, and plaintiff had to swerve his car to the right * * * in order to make way for it. * * * The glaring lights on the two on-coming automobiles, all helped to hinder plaintiff from seeing the obstruction in the road ahead of him until he was, as he says, within 10 feet of it, and too close to avoid striking it head-on, as he did."

The judgment for plaintiff was affirmed. Note how this squares with the declaration of the Supreme Court in the *Gaiennie Case:*

> "We cannot lay down a hard and fast rule to govern in these types of cases because so much depends upon the circumstances of each particular case"

and in the *Gaiennie Case* plaintiff was likewise allowed to recover when he struck, under markedly similar circumstances the rear end of a truck improperly parked on the highway which plaintiff did not see by reason of headlights.

(2) *Stafford* v. *Nelson Bros.*, 15 La. App. 51, 130 So. 234. Therein, defendant parked a machine weighing 30,000 pounds, nine feet wide, on the highway. Plaintiff sued and recovered, although moving at 35 miles an hour at the time of the injury, the court declaring:

> "We are of the opinion that he actually exercised the ordinary care which any prudent person would have taken confronted, as he was, with imminent danger to his life or bodily harm. Even if he did not exercise the best judgment considering the situation in which he had been placed by the inexcusable negligence of the defendants, he cannot be held liable for the results of the collision."

Thus likewise allowing recovery in a case strikingly similar to the *Gaiennie Case.*

Counsel for respondent concede (page 12):

> "In the reply brief of appellant (respondent) before the Circuit Court of Appeals, it was definitely pointed out that such cases were not applicable because each and all of the cases excusing a driver from contributory negligence were based upon the condition that the obstruction in the highway be unexpected and such as the driver was not required to anticipate and that the driver be guilty of no negligence contributing to the emergency."

And in respondents' brief it is said:

> "Slade, therefore, was not only charged with knowledge that some truck would likely be parked upon the shoulder of the highway (Hutchinson *v.* T. L. James & Company, Inc., (La. C. App., 1935) 160 So. 447), but he was bound to have anticipated that Greer's truck might

> overturn on the shoulder of the highway, and that, in running into the fog blindly, he took a chance upon encountering an obstruction."

But that which opposite counsel urged and which apparently confused the Federal Court of Appeals was that in these three cases the obstruction in each was a truck on the highway and in each of them, the plaintiff running into that truck was injured and in no instance was such plaintiff held guilty of contributory negligence, and in none of these cases was it intimated that the plaintiff should have anticipated the wrongful parking of an unlighted truck.

(3) *Hanno* v. *Motor Freight Lines, Inc.*, 17 La. App. 62, 134 So. 317 (La. Ct. App., 1st Cir.), Certiorari denied July 17, 1931.

There was an unguarded parked truck, and that when driving properly, "there was another automobile approaching him from the opposite direction, whose driver failed to dim his lights; that he pulled over to the right to give the oncoming car the proper amount of road for them to meet, and, in doing so, he ran into this parked truck," and recovery was allowed. It is to be noted that Judge Elliott on the Louisiana Court of Appeals dissented, but these three cases, with deference, under the *Gaiennie Case,* are authorities conforming to the law as laid down by the Supreme Court of that State.

It will be noted that opposite counsel cite as controlling two decisions from the Court of Appeals of Louisiana, *O'Rourke* v. *McConaughey* (1934) (Ct. App. La., Orleans), 157 So. 598 and *Blahut* v. *McCahil* (1935) (La. Ct. App., 1st Cir.), 163 So. 195, 198, which are not necessarily conflicting, due to different facts wherewith the Court was confronted. These predate the *Gaiennie* case, likely contributed to the conflict adverted to, and neither was approved in the controlling opinion.

In the *O'Rourke Case* that Court did not in any way criticize *Peart* v. *Orleans-Kenner Traction Co.* (La. Ct. App., Orleans, 1928), 123 So. 822, 823, where it was said:

> "Contributory negligence is pleaded. As we have observed the record establishes that the deceased stopped, looked, and listened, before crossing the track. It is contended that he either saw or should have seen, heard, or should have heard the electric car. To suppose that he saw or heard and continued on his way is to assume an intention to suicide or a state of imbecility. As to whether he should have seen or heard, and therefore his failure to do so was equivalent to not looking or listening under familiar principles of law, we observe that this rule has no application when surrounding circumstances excuse or prevent his failure to see or hear. Huddy on Automobiles (8th Ed.) Sec. 716; Loftus *v.* Pacific Electric Co., 166 Cal. 464, 137 P. 34.
>
> " 'If the driver of the hearse stopped, looked and listened when he reached the crossing and before going upon the first track, as he testified, and did not see, and could not see, any approaching train, and did not hear, and could not have heard, any signal or noise of a moving train, we are unable to see how the driver could be legally charged with contributory negligence.' Betz *v.* I. C. R. R., 161 La. 929, 109 So. 766, 767. See, also, Townsend *v.* Mo. Pac. R. Co., 163 La. 872, 113 So. 130, 54 A. L. R. 538."

The *Blahut* v. *McCahil Case* was a two-judge opinion, with Judge LeBlanc dissenting, and therein it is said that the *Stafford* case is overruled because:

> "At the time Act No. 232 of 1926 was not the law, but Act No. 296 of 1928 was in effect and the governing law of the case, and section 60 of Act No. 296 of 1928 provided that automobiles should have headlights with

> power to illuminate the road for a distance of 200 feet ahead; and which act and its provisions were not called to our attention, and the case was wrongfully decided and is overruled."

But, notwithstanding, with deference, when the oncoming automobile blinded the driver, the fact that this condition existed would in no way presently change the contention, in that case the court saying:

> "We are therefore convinced that young McCahil was grossly negligent and in fact driving recklessly, and that his negligence was a proximate cause of the accident."

There was likewise a parked truck, without lights and unguarded on the highway and the truck occupied the eastern half of the road. McCahil's car was traveling 40 to 45 miles per hour. McCahil testified he was driving about 40 miles per hour until "he was blinded by the oncoming car, and he then reduced his speed to about 30 miles per hour; that the southbound or oncoming car passed him about 15 feet from the truck; that he perceived the truck as he was passing the other car at about 15 feet away, and he immediately cut his wheel to the left, his right front door striking the ends of the pilings; that he did not have the best of lights, but that they were 'pretty good'; that the lights were medium, and the coming car had lights of the same type, enough however to blind him; that he had bad eyesight ever since he was six years old, and that he had had *five other* accidents prior to this one; that he had no time to apply his brakes; and that he had just time to somewhat swerve his car to the left."

(c) Opposite Counsel deny the possible applicability of the "emergency" doctrine, so-called, claiming responsibility

for not stopping when Slade is asserted to have seen the fog. Slade could not testify, and, with deference, the Louisiana Court has put blinding headlights upon the same footing substantially as fog, as to contributory negligence, and we thus have an obstruction in an interstate highway, wrongfully concealed by defendants' act. The act of the driver was precisely the same, whether there were fog or blinding headlights, and in at least one case, the emergency doctrine is thus applied.

In *General Exch. Ins. Corp.* v. *Romano* (1st Cir., La. Ct. App., 1939), 190 So. 168, there was collision between a parked truck * * * awkwardly parked * * * without lights, adjoining the highway, wherein with one dissent it was adjudged that no cause of action was stated, and therein it was said:

> "In the cases of Woodley & Collins *v.* Schusters' Wholesale Produce Co., Inc., 170 La. 527, 128 So. 469, and Blahut *v.* McCahil et al., La. App., 163 So. 195, it was held that where a motorist is blinded by bright headlights of an oncoming car, it is negligence for him to fail to slow down and bring his car under such control as to be able to stop for such a large and bulky obstruction in the highway as a truck parked thereon.
>
> "The cases of Stafford *v.* Nelson Brothers, 15 La. App. 51, 130 So. 234, and Hanno *v.* Motor Freight Lines, Inc., 17 La. App. 62, 134 So. 317, seem to be in conflict with the statement made above. It appears, however, that in those cases the court relied on the sudden emergency doctrine, holding that the drivers who ran into the obstructions in the highway—an excavating machine in the former case and a parked truck in the latter—were confronted by a sudden emergency created by the appearance of these large obstructions which loomed up in front of them, and under this situation the drivers were not required to use the same clear judgment as would have been the case had there been no sudden emergency."

*Broussard* v. *Krause*, (1st Cir.), 186 So. 384, was an action for damages arising for a collision between a parked truck and an automobile:

> "In one of the cases decided by the Supreme Court of this State which is cited by the defendants in support of their exception, Woodley & Collins *v.* Schuster's Wholesale Produce Company, 170 La. 527, 128 So. 469, 470, the Court merely stated it as a *general* rule that the driver of an automobile under the circumstances stated is guilty of negligence, and it is rather significant to note that in the sentence preceding that statement, the Court said, 'Whether it should be deemed negligence for the driver of an automobile to fail to slow down, in a case like this, depends so much upon the circumstances of the particular case that *it is not easy nor safe to lay down a hard and fast rule on the subject.*' (Italics ours—the court's). In the case of Kirk *v.* United Gas Public Service Company, 185 La. 580, 170 So. 1, the Supreme Court quoted with apparent approval the following ruling from Blashfield Cyclopedia of Automobile Law and Practice, Permanent Edition, Vol. 5, page 455, Section 3320: 'In the absence of notice to the contrary, there are certain assumptions which may be indulged by a motorist as to the condition of public streets and highways, whether he be traveling by day or by night. Among these are: (a) that the way is reasonably safe for travel and free from defects and unlawful obstructions.' The Court then goes on to state that the rule as stated prevails in this State as laid down as follows in Jacobs *v.* Jacobs, 141 La. 272, 74 So. 992, 997, L. R. A. 1917F, 253: 'The rule is well established in the jurisprudence of this state that a person using a public highway * * * has a right to presume and act upon the presumption, that the way is safe for ordinary travel, even at night.' * * *
>
> "In certain cases in which the driver of a car was blinded by the glaring headlights of another car which was approaching him from the opposite direction in which he was traveling as he emerged out of a curve,

or where the two cars met in such close proximity to an unlighted parked truck on the highway that the blinding occurred when it was altogether impossible for him to stop his car in time to avoid running into the parked truck, he was relieved of the charge of contributory negligence on the ground that his negligence was not the proximate cause of the accident. Futch *v.* Addison, 12 La. App. 535, 126 So. 590; Hanno *v.* Motor Freight Lines, 17 La. App. 62, 134 So. 317; Holcomb *v.* Perry, 19 La. App. 11, 138 So. 692."

In *Goodwin* v. *Theriot* (1st Cir.), 165 So. 342:

"From the provisions of our state statute already referred to, and provisions of a similar import from statutes in other states, there has been formulated in the jurisprudence a rule to the effect that the driver of an automobile on the public highways at night must keep his car under such control as to be able to bring it to a complete stop within the distance which his headlights project in front of him. This court has held in certain cases that this was not an inflexible rule, and that its application depends on the facts and circumstances arising in each case. In certain cases cited by the district judge as authority in this case, because of the peculiar facts, the rule was relaxed and the driver of the automobile was held free of negligence. These are the cases of Futch *v.* Addison, 12 La. App. 535, 126 So. 590; Stafford *v.* Nelson Bros., 15 La. App. 51, 130 So. 234; Hanno *v.* Motor Freight Lines, Inc., 17 La. App. 62, 134 So. 317. In all three of these cases, however, it was shown that the driver of the automobile was going at a moderate rate of speed, and that, as he approached the parked object on the highway, he became suddenly and temporarily blinded by the glaring headlights of another car coming from the opposite direction. The unexpected emergency thus created stood as the important and determining factor in especiallly two of those cases. In the absence of any such emergency, the present case is readily distinguishable from those referred to. It is

to be observed, moreover, that this court *in a recent case has gone far in the direction of holding the driver guilty of contributory negligence without regard to the emergency created by dazzling lights from another car,* holding that it is his duty to have his car under control in such a situation as to be able to stop it 'in a moment.' See Blahut *v.* McCahil et al. (La. App.), 163 So. 195."

(e) Certain Federal Cases and other authorities.

Compare *Chesapeake & O. Ry. Co.* v. *Waid,* 4 Cir., 25 Fed. (2d) 366, where Judge Parker said:

"And, to quote again what was said by Mr. Justice Lamar in Grand Trunk Ry. *v.* Ives, 144 U. S. 408, 417, 12 S. Ct. 679, 682, 366 L. Ed. 485, quoted with approval by Chief Justice Fuller in Baltimore & O. R. Co. *v.* Griffith, 159 U. S. 603, 611, 16 S. Ct. 105, 108 (40 L. Ed. 274), and by Mr. Justice Harlan in Texas & P. R. Co. *v.* Gentry, 163 U. S. 353, 368, 16 S. Ct. 1104, 1109 (41 L. Ed. 186):

" 'There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care', 'reasonable prudence', and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannnot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the

determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court.' "

Compare 37 A. L. R. 590 (note); 73 A. L. R. 1025 (note).

(f) Complaint is made that petitioner did not rely on *Gaiennie* v. *Co-Operative Produce Company* in the Court of Appeals (Respondents' Brief, 12). But,

(1) Petitioner did call this case to the attention of the Court of Appeals, with its subsequent judicial history, before this writ was applied for, so that the Court of Appeals was fully acquainted therewith and could have conformed thereto;

(2) Petitioner contended, under other cases cited, for the precise rule laid down in the *Gaiennie case,* and insisted that these decisions thus controlled, especially those cases herein relied on;

(3) But, if our interpretation of the *Gaiennie case* is correct, it was and is the controlling decision of the Louisiana Supreme Court. It was directly incumbent upon the defendant, when the judgment of the District Court conformed to the *Gaiennie case,* not to seek a reversal of this District Court judgment, in conformity with the Gaiennie decision of the Supreme Court of Louisiana, controlling, without disclosing to the Federal Court of Appeals that respondents' contention was in contravention of the *Gaiennie case* and by the *Gaiennie case* denied. In other words, respondent has caused, by failure to properly advise the Federal Court of Appeals as to the *Gaiennie case,* a judgment to be rendered contrary to and in conflict with the law as settled under a local statute by the Supreme Court of Louisiana.

(g) Petitioners, of course, rely strongly on the contention that in this case contributory negligence is no defense (P. C. 35).

## V.

**Opposite Counsel Claim That Slade "Struck Greer's Overturned Truck With a Terrific Impact Shearing the Steel 'King Pin' Approximately Three Inches in Diameter, Releasing the Trailer to His Truck, Which Plowed Forward Into the Cab * * *" (Brief, Page 9).**

Supplementing that said in the petition, we add:

Therein, respondents misconceive the record. Respondents cite therefor "R., 95", wherefrom we quote:

> "A. He (Slade) had the old type fifth wheel. I believe they call it a yoke and pin.
> "Q. And the center ball would be 3 inches in diameter?
> "A. Yes, and the two angle irons that come up with a hole in them and the pin drops down in that hole.
> "Q. That is what gave way?
> "A. Yes, sir."

The same witness testified (R. 56):

> "The trailer came off the fifth wheel and came in on Mr. Slade and crushed the cab."

With deference, the steel three-inch ball did not break, nor did this witness so say.

"The burden of proof is on the defendant to show that the plaintiff was negligent and that his negligence contributed to the injury." *Gaiennie* v. *Co-Operative Produce Co., supra.*

"The value of a photograph as evidence is not for the court to determine, but the jury." *Cyc. Automobile Law, Huddy,* 9th Ed., Vols. 19-20, Sec. 26, page 131.

Defendant did not question any witness as to how or why the Fifth wheel gave way, nor did it endeavor to show that said pin or irons had not become crystallized or "fatigued". Thereasto, this Court may take judicial notice. *Johnson* v. *Atlantic Coast Line Railroad,* 112 S. C. 47, 99 S. E. 755.

"Iron subjected to strain has a tendency to crystallize and become brittle and weak." *Wilkinson* v. *Evans* (1907) 34 Pa. Sup. Ct. 472.

*Nowoty* v. *St. Louis Brewing Assn.*, (1914) 185 Mo. App. 709, 171 S. W. 941.

In *American Airways* v. *Ford Motor Co.*, (1939) 10 N. Y. Supp. (2) 816, 170 Misc. 721, it is said:

> "There is no doubt that the hub broke through fatigue break. That is a crack caused by repeated stresses and any one of which might be successfully resisted by the metal. It was shown that metal objects stand strains of certain force indefinitely without discoverable effects. Greater forces produce results only after repeated applications. This is called fatigue. It takes the form of a crack in the object, which may be in the interior and not visible upon the surface. This crack grows, very slowly at first but with increasing speed, and the final states of growth, which ends in a separation of the metal object into two broken parts, is very rapid indeed."
>
> *Johnson* v. *Atlantic Coast Line Railroad*, 112 S. C. 47, 99 S. E. 755.

Had crystallization or fatigue occurred, the break might have well happened without any strain at all, but with the burden resting upon defendant thus to show, it saw fit not to introduce any evidence wherefrom a presumption adverse to it and favorable to Slade should be integrated into the decision of this cause.

## VI.

## Other Inaccuracies.

With deference, respondents' contention as to the facts, especially when in conflict with the facts as claimed by petitioners, are inaccurate.

## VII.

## Resume.

The majority of the Court of Appeals assumed to say,

"It is settled law in Louisiana that one entering a fog * * * must proceed at such a speed as he can stop the car in the distance within which he can see objects in his way", but we repeat that said by the *Gaiennie Case* in the Court of Appeals of Louisiana, first circuit, "but were left with serious doubt in view of the apparent conflict in some of the decisions of the various Courts of Appeal of this State on the question of contributory negligence as pleaded against the plaintiff. 199 So. 611," which declaration as to conflict is conclusive on the Federal Court. *West* v. *American T. & T. Co.*, 311 U. S. 223, 85 L. Ed. 139, 144; *Six Companies* v. *Highway Dist. No. 13*, 311 U. S. 180, 85 L. Ed. 114.

Wherefore, for the reasons set forth in the original brief and those supplemented herein, we, with deference, insist that the writ should be granted; otherwise plaintiff, who would have recovered in the Louisiana Courts under a verdict for it, will be denied that right in the Federal Court through the Federal Court having refused to follow the State decisions of the Supreme Court construing a local statute.

Respectfully,

MARCELLUS GREEN,
ROSS R. BARNETT,
P. Z. JONES,
GARNER W. GREEN,
*Counsel for Petitioners.*

FRANK F. MIZE,
*Forest, Mississippi;*
GREEN & GREEN,
*Jackson, Mississippi;*
BARNETT, BARNETT, JONES & STONE,
*Jackson, Mississippi,*
*Of Counsel.*